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Anti-SLAPP Litigation in the Healthcare Industry Merits Careful Consideration

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California Code of Civil Procedure § 425.16, California's "anti-SLAPP" statute (for "Strategic Lawsuit Against Public Participation"), forbids lawsuits brought to silence, censor, or intimidate defendants in retaliation for exercising their First Amendment rights. (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App. 4th 777.) The statute contains an aggressive fee shifting provision intended as a deterrent to bringing such suits, by which the court is required to award attorneys fees to a defendant who brings a successful anti-SLAPP motion. (Code Civ. Proc. § 425.16(c)(1).) This provision – indeed, the entire statute – is broadly construed, "so as to effectuate the legislative purpose of reimbursing the prevailing defendant for expenses incurred in extricating [itself] from a baseless lawsuit." (*Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 446.) By contrast, a plaintiff who defeats an anti-SLAPP motion is entitled to fees only on a showing that the anti-SLAPP motion is itself "frivolous or is solely intended to cause unnecessary delay." (*Id.*) Courts use a two-step process to analyze anti-SLAPP motions. Step one is to determine whether the cause of action "arises from" protected activity. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) If so, the burden shifts to the plaintiff to show that the case has "minimal merit." (*Id.*) What constitutes "protected activity" is set forth in subdivision (e) of the anti-SLAPP statute itself.

It is safe to assume that the majority of California litigators are familiar with the anti-SLAPP statute, at least in broad terms. However, attorneys whose practices focus primarily or exclusively on healthcare law are often unaware of the broad reach of the statute, or the nuances of the law as it applies to hospitals, skilled nursing facilities, physicians, nurses, and others in the healthcare field. This article aims to alert practitioners to issues that are perhaps more specific to healthcare law than to a general litigation practice.

The hospital-physician relationship, and the peer review process in particular, appears to spawn an inordinate amount of anti-SLAPP litigation. The seminal case is *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192. In *Kibler,* a hospital's peer review committee summarily suspended the plaintiff-physician's medical staff privileges after he behaved violently at work. When the physician sued, accusing the hospital of tortious interference with his right to practice medicine, the hospital filed an anti-SLAPP suit, asserting that the peer review process leading to Dr. Kibler's suspension was protected activity under subdivision (e)(2) of the anti-SLAPP statute. That section defines the activities which satisfy the first prong of the anti-SLAPP analysis, and includes "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, *or any other official proceeding authorized by law.*" The trial court granted the hospital's anti-SLAPP motion on the court's determination that the hospital's peer review procedure is such an "other

official proceeding authorized by law," a conclusion the Supreme Court later confirmed. (*Kibler, supra* 39 Cal. 4th at 199–200.)

Since 2006, many courts have followed *Kibler's* reasoning. In 2012, the Courts of Appeal for the Fourth and Fifth Districts looked to *Kibler* in *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65, and *Fahlen v. Sutter Cent. Valley Hospitals* (2012) 145 Cal.Rptr.3d 491, both cases where a physician sued based on his summary suspension.[1] Even more recently, the Second District applied *Kibler* to accusations that witnesses in peer review proceedings gave false and defamatory evidence, dismissing the action when the physician failed to show a likelihood of success. (*Shaham v. Tenet HealthSystem QA, Inc*. 2014 WL 1465882, at *9-*13 (Cal.App. 2 Dist.).)

Still, there are limits. In *Samuel et al. v. Providence Healthcare Systems – Southern California*, 22013 WL 6634119 (Cal. App. 2d Dist., December 17, 2013), two surgeons filed a complaint against the hospital and another trauma surgeon, accusing the other surgeon of battery and the hospital of negligent failure to control that surgeon, including taking no disciplinary action when the defendant surgeon attacked one of the plaintiffs. The Court of Appeal held that the hospital's motion failed on the first prong of the anti-SLAPP analysis, because the statute protects only communicative conduct, while the failure to control a physician is essentially *non*-communicative in nature.

Similarly, in *San Diego Hospital Based Physicians v. El Centro Regional Medical Center*, 2013 WL 3975762 (Cal.App. 4th Dist., August 1, 2013), the Court of Appeal did not apply *Kibler* to contractual claims based on the hospital's decision to terminate an exclusive contract with plaintiff physicians. The Court rejected El Centro's argument that a closed session of the hospital Board's public meeting constituted an "official proceeding." And in *KSM Healthcare v. Always Best Case Mgmt.*, 2014 Cal. App. Unpub. LEXIS 86, 15 (Cal. App. 2d Dist., Jan. 8, 2014), a skilled nursing facility sued a company whose nurse evaluator allegedly conspired with another facility to fraudulently transfer patients to that other facility. Defendants' anti-SLAPP motion argued that the complaint arose out of protected activity, as the causes of action were all based on the nurse evaluator's reports to the California Department of Health Care Services. But the Court of Appeal affirmed the trial court's denial of the anti-SLAPP motion, holding that the gravamen of the complaint was ABCM's attempts to steal patients for another facility — the nurse's reports were simply a method by which the scheme was accomplished, not the thrust of the claim. Courts have also limited *Kibler* when the issue is judicial review of a peer review decision, rather than a claim for damages arising out the peer review decision. (*Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, 58.)

The analysis of *Kibler* and its progeny has broad application throughout the healthcare industry. Because of the overlapping layers of state and federal governmental oversight, reporting requirements, and internal and external hearing and appeal procedures, many disputes will satisfy the first prong of anti-SLAPP analysis as arising from "other official proceedings authorized by law." Although plaintiffs may still prevail against an anti-SLAPP motion on the second prong, prospective litigants must carefully consider their ability to make the required "likelihood of success" showing within the short time period mandated by the anti-SLAPP statute, and without any discovery. Failure to do so can lead to the costly consequence of an attorney fees award.

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[1]The Supreme Court's recent decision in *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, focused exclusively on the narrow issue of whether Dr. Fahlen was required to exhaust his administrative remedies prior to filing a whistleblower suit. (*Fahlen, supra,* 58 Cal.4th at 665.) While exhaustion of remedies was part of the *Nesson* court's conclusion that Dr. Nesson could not prevail on the merits, Dr. Nesson had also refused to cooperate with the hospital's peer review process and "took a leave of absence and actively thwarted any determination as to whether he should have continued in his position as the medical director of radiology," which formed a separate basis for determining that he failed to make his required showing. (*Nesson, supra*, 204 Cal.App.4th at 82, 85.)